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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

EVERPORT TERMINAL SERVICES and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1546, AFL-CIO AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1414, AFL-CIO and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1546, AFL-CIO, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1414, AFL-CIO	Case 32-CA-172286 Case 32-CB-172414 **BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

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I. INTRODUCTION

The Charging Party International Association of Machinists & Aerospace Workers, District Lodge 190, Local Lodge 1546, AFL-CIO, And International Association of Machinists And Aerospace Workers, District Lodge 190, Local Lodge 1414, AFL-CIO ("Charging Party," "Machinists" or "IAM") supports the Decision of the Administrative Law Judge ("ALJ"). We diverge, however, with respect to issues raised by the Respondents in defense of the allegations in the Complaint. We take Cross-Exceptions to the refusal of the ALJ to allow Charging Party to litigate the validity of those defenses. We address those issues raised by the Charging Party and the scope of the remedy in these Cross-Exceptions. We take Cross-Exception to the Remedy and Order.

II. THE EMPLOYER UNLAWFULLY RECOGNIZED THE ILWU

The heart of this case involves the unlawful recognition by Everport Terminal Services ("employer," "Everport" or "ETS") of the International Longshore and Warehouse Union ("ILWU") in June of 2015 in anticipation of when Everport would take over the operation of the Ben E. Nutter Terminal later that year. ETS joined the Pacific Maritime Association ("PMA"). The agreement between the PMA and the ILWU is the Pacific Coast Longshore and Clerks Agreement ("PCL&CA" or "Agreement").

The employer's recognition of the ILWU was premature, because, at the time it signed the agreement, it had no employees. The ILWU's and PMA's argument is that Everport, as a member of the PMA, is permitted to enter into a pre-hire agreement, which is permitted only in the construction industry. 29 U.S.C. § 158(f). The Respondents, Everport and ILWU, ask the ask the Board to carve out an exception to the prohibitions in 29 U.S.C. § 158(a)(2) and other sections of the Act that prohibit unlawful assistance and premature recognition of unions by employers.

The second issue in this case is that ETS engaged in a discriminatory hiring pattern by weeding out enough IAM-represented employees of the predecessor to avoid becoming a successor. The evidence is uncontradicted that, at the time all of this occurred, the PMA, ETS

and the ILWU were well aware of the prior cases where successorship issues had been raised when terminal operators changed on the waterfront.

The issue in those two cases is that a new terminal operator or contractor took over a terminal or the maintenance work at the terminal and either withdrew recognition from the Machinists or failed to recognize the Machinists. In this case, ETS, the ILWU and PMA concocted a scheme to avoid hiring enough of the IAM represented employees to constitute a successor.

The first case is the *PCMC* case reported is *PCMC/Pacific Crane Maintenance Company, Inc.* at 362 NLRB No. 120 (2015), *enforced* 880 F 3d 1100 (D.C. Cir 2018). Pacific Crane Maintenance Company ("PCMC") (although as a single employer and not a successor) took over the work at a terminal from its single controlled employer Pacific Marine Maintenance Corporation) and withdrew recognition from the Machinists. The Board found the conduct unlawful and in the interim the employer, PCMC, settled with the Union. The ILWU continued to challenge the Decision by the Board that the representation of the mechanics could not unilaterally change and summarily lost in the DC Circuit. There was uninterrupted employment by most of the employees in Oakland and Tacoma without change in terminals.

The second case is *Ports America Outer Harbor* 366 NLRB No 76 (2018) In that case, the Board has found that Ports America Outer Harbor ("PAOH") was a successor (*Burns* and *Golden State*) to PCMC when it took over the maintenance and repair operation at the terminal in Oakland. All the employers in that case also settled (including another alleged joint employer). The Board also found that the ILWU unlawfully accepted recognition. The ILWU continues to litigate this case, and this case is pending before the D. C Circuit on a Petition for Review filed by the ILWU. There was uninterrupted employment by all of the employees in Oakland.

Although these are the two current cases, the PMA, ETS and ILWU were well-aware of the risks of creating a successorship and conspired, concocted and unlawfully engaged in a hiring pattern to avoid the risk and consequences of successorship. This is a repeat of earlier scenarios where the ILWU and the PMA and employer members of the PMA did the same thing. This

conduct involving discrimination against many employees makes the conduct more egregious and reprehensible.

Third, ETS has offered no business reason why it would not have hired virtually all of the IAM-represented mechanics. Although it has suggested that it eventually weeded out a few for pretextual reasons, it seems evident that ETS would have been a perfectly clear successor but for its unlawful conduct. The Board should therefore find that in addition to being a *Burns* successor, it is also a perfectly clear successor within the meaning of *Nexeo Solutions, LLC,* 364 NLRB No. 44 (2016).

The Board should find further reaffirm that the conduct of the ILWU breaches its duty of fair representation by asserting the right to represent the employees performing M & R work where it was not the lawful representative. The remedy should be amended as noted below.

In summary, then, the ILWU, ETS and PMA cannot hide behind an unlawful procedure in which an employer unilaterally and unlawfully recognized the ILWU prematurely. There is no basis to carve out any employer or industry from the prohibitions contained in Section 8(a)(2) and Sections 8(a)(1) and (3), 29 U.S.C. § 158 (a)(1) and (3), against an unlawful premature recognition of unions.

The Administrative Law Judge determined that a broad order was necessary and appropriate. She stated: "It is likely that ILWU will continue its path of unlawful conduct involving other employers, employees and job applicants." See Decision, page 79:23-24. This is reaffirmed by the PCMC and PAOH cases. This is reaffirmed by the Exceptions in this case particularly by the ILWU which continues to maintain its right under the PCLCD to represent everyone on the waterfront.

Her Order, however, fails to achieve the order which she directed. The Order, as drafted by her, is limited to the Everport's bargaining unit. See Decision, page 83:31-84:10. Additionally, the cease and desist language at page 83:15-27 is also improperly restricted to the units involved in this case. The language in both provisions must be expanded to include all employers at any time in the future to accomplish the broad order purpose.

III. ISSUES RAISED BY THE CHARGING PARTY

In response to the ILWU and ETS's argument that they could lawfully apply the PCL&CA, the Charging Party raised various issues. The Administrative Law Judge rejected the full presentation of a record and evidence to allow the Charging Party to litigate these issues.

We summarize those issues below in order not to waive them and ask the Board to allow the Charging Party to prove these facts and theories. We note that these theories do not vary the theory of the case to the extent controlled by the General Counsel. They go rather to the defense of the Respondents. To the extent that the PCL&CA cannot be applied to justify the Respondents' position, the Charging Party can litigate these issues. They do not vary in respect or affect the General Counsels theory of the violation, they go only to defenses raised by the Respondents. These arguments would have invalidated the application of the PCL&CD to the employees of ETS on the facts of this case solely in response to the defenses raised by Respondents.

A. THE PCL&CA IS AN UNLAWFUL MEMBERS-ONLY AGREEMENT

The PCL&CA applies to Class A Registered Longshore Workers (which includes mechanics). Although it also applies to probationary employees and Class B Registered Mechanics, they are not permitted to become members. Thus, it is only a select group of employees covered by the Agreement who are allowed membership and thus the right to determine, through internal voting procedures, the provisions in the Agreement that govern their working conditions. Indeed, the special provisions in the Agreement that apply to Class A Registered Longshore Workers, including substantial preferences in hiring, layoff and other provisions, makes the Agreement unlawful because it benefits only those who are members, and membership is severely restricted. See, Tr: 59:9-10, 2583:14-2584:2.

B. THE DISPATCH PROCEDURES ARE UNLAWFUL

Board law allows an employer and a union to maintain a hiring hall provision that requires non-members to pay a hiring hall fee. If that fee is in excess of the normal membership dues, it is presumed unlawful, and that excessive fee establishes a prima facie case. *See Local*

825 Int'l Union of Operating Eng's, 137 NLRB 1043 (1962). *See also IATSE Local 720*, 352 NLRB 1081 (2008). As in that case, determining whether the hiring hall fee is excessive or discriminatory often depends upon looking at the facts of the costs of the hiring hall, as well as the dues paid by the Local members as compared to the actual fees charged to the non-members.

Here, there is one structural difference between the payment of the cost of the operation of the hiring hall (called the Joint Dispatch hall) and the way the costs are borne in every other Board case. In every other case, the Union sponsored and operated the hiring hall and paid the full cost. Thus, charging non-members an amount near the amount of dues was justifiable. In contrast, the ILWU pays only 15% of the cost because the employers pay 85% of the cost. Thus, there can be no justification for a system where non-members pay an amount equivalent to almost the full amount of dues, which members pay.

The Contract document provides in Section 8 (ILWU Exhibit 4) provisions regarding payment of the dispatch hall fee. Section 8.12 provides as follows:

> Any Longshoreman who is not a member of the Union shall be permitted to use the dispatching hall only if he pays his pro rata share of the expenses related to the dispatching hall, the Labor Relations Committee, etc. The amount of these payments and the manner of paying them shall be fixed by the Joint Port Labor Relations Committee.

On its face, that provision is unlawful, since the costs extend beyond the costs of the dispatching hall. The non-members required to pay the costs of "the Labor Relations Committee, etc." Since neither of these directly relates to the operation of the dispatching hall, they cannot be included in the costs assessed against a non-member. This is particularly true of the reference to "etc."

Section 8.15 provides:

> The Local Union shall bear one-half of all expenses of the dispatching hall less the amount received by the Joint Port Labor Relations Committee from non-members of the Union as pro rata shares payable under Section 8.2 (See, Addenda, Dispatch Hall Costs.)

This further confirms that Section 8.12 is unlawful. All of what is paid by non-members is received by the Joint Port Labor Relations Committee. This means that the non-members are paying money other than to the Union. This is not permitted under any Board case we can find. Nor is it a lawful deduction since not authorized.

These provisions are modified by the Addenda at pages 225-226 which relate to dispatch hall costs. The agreement provides that the employers are responsible for 85% of the costs. In summary, the employers through the PMA bear 85% of the cost of the dispatch hall.

This also creates another complication because it gives the Committee the right to increase the amount. Thus, this is a form of unlawful dues increase to the extent it is treated as dues. Members have the right under federal law to vote on dues increases.

This effectively means that virtually all the dispatch hall costs are borne by the employers. This leaves very little for the members to pay as part of their dues. It leaves very little for a pro rata share to be paid by the Class B registered Longshore and the Herman-Flynn mechanics.

As part of the record in that case, the ILWU offered Exhibits 26 and 27 which are the annual reports of the PMA. The PMA annual report reports on the amount of the dispatch hall costs. The most recent report shows that the dispatch hall costs for 2016 were a total of $35,841,481. Of that, the ILWU paid a total of only $4,934,477 with the remaining paid by the PMA. The ILWU paid about 10% of the cost.

The annual report also repeats the language we pointed to above, which is unlawful:

> Any Longshore worker who is not a member of the Union is permitted to use the dispatching hall only if the worker pays a pro rata share of the dispatching hall expenses, the Labor Relations Committee's expenses and other related expenses.

This also makes suggests that the non-member pays a pro-rata share of the entire cost of the dispatch hall even though the union only pays 15% of the cost.

In summary, the dispatch procedures are unlawful because it requires Registered B Longshore Workers and Herman/Flynn mechanics and probationary employees to pay unlawful

costs. See, Tr. 2580:13-17, 2581:6-9, 2581:23-2582:9, 2582:24-2583:4, 2793:22-2794:2, 2794:5-7.

C. THE AGREEMENT DISCRIMINATES AGAINST HERMAN/FLYNN MECHANICS

The Herman/Flynn mechanics are required to remain at the terminal where they were hired or remain as mechanics for either twelve or fifteen years, depending on the circumstances. This has been a long-standing rule arising out of the Herman/Flynn letters, which are now more than forty years old. They facially discriminate against employees who were hired as mechanics from outside the dispatch hall. The rule has the direct effect of discriminating against employees who were not members of the ILWU as Longshore workers when they were hired into the unit. The ILWU and the PMA and ETS offered no business justification or other justification whatsoever for such a lengthy period of discriminatory treatment, requiring these mechanics to remain either at a terminal or as mechanics. The fact is that this prevents them from working as Longshore workers on a permanent basis if they decide they no longer want to be mechanics. Alternatively, it prevents them from working as Longshore workers and then taking mechanic work from the dispatch hall. This unlawful discrimination, which was never justified or explained, renders the Agreement unlawful and certainly unlawful as to the mechanics who were hired by ETS. See Transcript references above.

D. THE PROBATIONARY MECHANICS AND REGISTERED B MECHANICS WHO WERE REQUIRED TO PAY THE HIRING HALL COSTS WERE DISCRIMINATED AGAINST

Probationary and Registered B Mechanics were required to pay the hiring hall fee (and not union dues) even though they may never have used the hall because they had steady employment. They were required to pay the fee, even for those months when they did not use the dispatch hall. This is not lawful since the ILWU does not contend these are dues amounts. It cannot do so since these workers are not members.

E. THE PMA IS NOT A *BONA FIDE* MULTI-EMPLOYER ASSOCIATION

The reason why the PMA is not a *bona fide* labor multi-employer association is that it is controlled by non-employers. *See* Discussion in Part F immediately below.

For purposes of this case, the evidence is clear that non-employers, including the carrier classes (both International and Domestic) control the PMA. They are not employers. There is no evidence that they are employers. Because the PMA is controlled by non-employers, and certainly non-employers within the bargaining unit either at ETS or any bargaining unit contained within the Agreement, the Agreement is unlawful. See Tr. 2505:25-2506:11; 2512:17-23; 2515:5-9; 2518:10-22

F. THE AGREEMENT VIOLATES SECTION 8(e)

There are two theories why the Agreement violates Section 8(e).

First, the subcontracting provision, which prevented ETS from subcontracting to any employer other than a signatory of the ILWU, is, on its face, an unlawful agreement within the meaning of Section 8(e). It prohibits subcontracting except to ILWU employers. *See* Sections 1.7 and 1.8.

Because it is unlawful on its face, the burden was upon the ILWU, the PMA and ETS to establish any work preservation object. They failed to put any evidence in the record establishing a legitimate work preservation object.

There also can be no work preservation argument at the Ben E. Nutter Terminal since the IAM had historically represented the employees during the maintenance and repair work for 40 years or more. *See Int'l Longshore & Warehouse Union,* 363 NLRB No. 12 (2015) (where ILWU members had never performed disputed work, there can be a valid work preservation claim).

Section 8(e) of the National Labor Relations Act forbids unions and employers from forming any agreements where the employer agrees to "refrain from . . . dealing in any of the products of any other employer, or to cease doing business with any other person." 29 U.S.C. § 158(e). However, if the agreement's objective is to protect bargaining unit employees' work that they traditionally performed, the agreement does not contravene Section 8(e) because the agreement's objective is primary in nature. *Nat'l Woodwork Mfrs. Ass'n v. NLRB,* 386 U.S. 612, 644 (1967). "The touchstone [of the inquiry] is whether the agreement or its maintenance is

addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." *Id*. at 645. "The determination of § 8(e) claims . . . is a fact-bound endeavor." *Marrowbone Dev. Co. v. Dist. 17, United Mine Workers*, 147 F.3d 296, 303 (4th Cir. 1998).

A work preservation agreement must satisfy two elements: (1) "it must have as its objective the preservation of work traditionally performed by employees represented by the union," and (2) "the contracting employer must have the power to give the employees the work in question – the so-called 'right of control' test . . . ." *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980). "The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work." *Id*. at 504-05. "Where the additional work requires the same skills and abilities as the traditional work of the unit employees, the new work has been viewed as 'fairly claimable', and the clauses by which such work is acquired have been upheld as primary work preservation agreements." *Frito-Lay, Inc. v. Retail Clerks Union*, 629 F.2d 653, 659 (10th Cir. 1980). The PCL&CA agreement does not meet those requirements. As noted the work has never been performed by employees represented by the ILWU at the Ben E. Nutter terminal. Second, the shipping lines which call at that terminal and which are signatory to the contract, have no right to control the work done by the independent terminal operators. An Administrative Law Judge has found that these provisions are not a lawful work preservation clause. See, *Matson Terminals*, 20-CA-188087 at footnote 16.

The second reason why the language is unlawful is, as we have explained above, the PMA is controlled by non-employers. As a result, there can never be any legitimate work preservation object because those carriers have never employed any Longshore workers and certainly never employed any mechanics.

Many of these facts are confirmed in the Board's Decision, *International Longshore & Warehouse Union*, 363 NLRB No. 12:

> The PMA, a San Francisco-based multiemployer bargaining agency, negotiates and administers on behalf of its employer

> members a coastwise maritime labor agreement with the ILWU. Its membership includes domestic carriers, international carriers, and stevedores that operate in California, Oregon, and Washington. PMA policy is established and controlled by an 11-member board of directors. The 2011 PMA annual report shows that seven members of the board were officials of international carriers, two were officials of domestic carriers, and two were officials of stevedoring companies, similar to ICTSI, with no carrier operations.

Int'l Longshore & Warehouse Union, 363 NLRB No. 12, slip op. at 5.

In 2008, PMA and ILWU agreed to and modified the PCL&CA. PMA is a multiemployer association consisting of waterfront employers, including international class carriers, domestic class carriers, stevedoring/non-carriers, terminal operators, and subcontractors. International and domestic class carriers generally do not employ any employees who perform bargaining unit work (e.g. stevedoring, maintenance, or clerk work). They rarely operate or have control over terminal operators, but sometimes they have a subsidiary or joint venture that operates a terminal. They do not contend they are a joint employer with any such subsidiaries.

A terminal operator employs stevedores, clerks, walking bosses, and security guards to conduct its operations. A terminal operator limits its activities to the terminal – it operates cranes and moving equipment, loads and unloads ships, and moves cargo off the docks through independent truckers. It does not employ anyone who works on the ships. Some terminal operators also employ maintenance and repair employees, and some use subcontractors. At terminals, maintenance employees maintain moving equipment, like Transtainers, Bombcarts, Top-Picks, and other equipment used to transport containers and other equipment around on the docks. They also maintain cranes, chassis, containers, and refrigerated containers. They do no maintenance work for the carriers having anything to do with the ships.

The PCL&CA contains a provision prohibiting subcontracting of maintenance and repair work unless the subcontractor is a PCL&CA signatory. Because of this subcontracting restriction, carriers cannot subcontract to terminal operators who do not employ an ILWU workforce, and terminal operators cannot subcontract maintenance and repair work to contractors who are not signatory to PCL&CA. One problem with this provision is that several West Coast

terminals already have contracts with other unions, like the International Association of Machinists and Aerospace Workers, whose mechanics perform this maintenance work and are not parties to PCL&CA. To address this problem, PCL&CA exempts certain terminals in the so-called red-circle agreement. But those red-circled terminals are diminishing. The ILWU and PMA take the position that if a new contractor takes over the work, the red-circle language does not apply and the new contractor must work under the terms of the PCL&CA. Thus, in the Everport case, Everport was required to use an ILWU workforce either directly or through a subcontractor even though the prior workforce was IAM represented.

The Board noted the following in *International Longshore & Warehouse Union*, 363 NLRB No. 12:

> As a coast committeeman, Sundet personally participated in the negotiation of the 2008-2014 PCL&CA on the union side and frequently participates as an ILWU representative on the CLRC. Prior to 1978, he testified, the dockside maintenance and repair work (which from ILWU's perspective always included the reefer work at issue here) had been left to local agreements. However, under the 1978 PMA/ILWU agreement, the maintenance and repair work became subject to the Coast-wise PCL&CA. Still, that agreement provided that PMA employers with a past practice of subcontracting maintenance and repair work to employers that did not employ ILWU-represented labor before the effective date of the 1978 agreement could continue to engage in this practice. Ultimately, this exception was construed to permit those PMA employers to transport their exemption to other locations, thereby leading to the spread of this subcontracting practice at the expense of jobs the ILWU members considered to be their own.
>
> Sundet further testified that the 2008 agreement ended the subcontracting of all maintenance and repair work except at those locations where a PMA member company had an existing collective-bargaining agreement with another labor organization to perform that work. In exchange for this concession from the PMA that the ILWU thought would stem the erosion of maintenance and repair jobs for the workers it represented, the ILWU agreed to cooperate with the introduction of additional mechanical and robotic equipment at West Coast terminals designed to improve efficiency even though these technological advances would inevitably displace some ILWU equipment operators.

> This arrangement was implemented within the 2008 PMA/ILWU agreement by means of a Letter of Understanding (LOU) attached to the 2008 PCL&CA. The LOU designated excepted locations to the 2008 prohibition against subcontracting by labeling them as "red-circled," meaning that the existing practice of using non-ILWU labor could continue but only at those site-specific locations. From the ILWU's perspective, this approach served to stop the further spread of the practice of using non-ILWU labor to perform maintenance and repair work. The LOU did not recognize any red-circle work at any Portland terminal.

Int'l Longshore and Warehouse Union, 363 NLRB No. 12, slip op. at p. 9.

For purposes of this case, the Bylaws of the PMA establish an international carrier class which has no employees in the bargaining unit. These international carriers, by the terms of the Bylaws, have overwhelming control of the PMA. The Bylaws provide that two members of the Board come from the domestic carrier class and seven come from the international carrier class. Article I, Section 4. There is no requirement that any representative of the stevedore/non-carrier class be on the Board.

Only the stevedore/non-carrier class actually operates terminals and employs members within the bargaining unit. They are represented by only two members on the Board of Directors.

This control is also reflected in the Annual Reports, which reflect the names and identities of the members of the Board of Directors.

In summary, then, it is clear from the Bylaws and the Annual Reports that the international carrier class totally controls the Pacific Maritime Association. The domestic carrier class, if you add them in, also solidifies this control. It is also clear from the record in this case that neither has any employees within the bargaining unit and, in particular, any employees who have ever or do perform any maintenance and repair work.

This separation was introduced to specifically insulate the carriers from labor issues. The historical development was to remove all dockside and shoreside labor from the carriers and transfer to terminal operators or other contractors.

For the purpose of this analysis, the evidence demonstrates that the carriers control the PMA through the voting arrangements under the By-Laws. However, the analysis also explains why the provision is unlawful even if the terminal operators could, as a minority group, establish a work preservation object. For purposes of this analysis, the assumption is that the international carriers and domestic control the PMA.

Additionally, the analysis further explains what would occur if the analysis focuses only the terminal operators, whom we concede do employ employees within the bargaining unit, either directly or through subcontractors who are signatories to the PCL&CA. See Tr. 55:23-56:1; 58:23-25; 4010:16-18.

For these reasons, the PCL&CA is unlawful under Section 8(e).

G. THE AGREEMENT VIOLATES ANTITRUST LAWS

As explained above, the PMA is controlled by non-employers. The antitrust laws are clear that there is only an exemption for agreements between labor organizations and employers from the scope of the antitrust laws. *See Int'l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, 863 F.3d 1178 (9th Cir. 2017). As the record clearly indicates, the PMA Agreement is with non-employers and is entitled to no exemption under the antitrust laws.

It is also an effort to unlawfully control the market for maintenance and repair of equipment on the waterfront. See *Connecticut Ironworkers Employers Association v. New England Regional Council of Carpenters*, No 16-485 (2nd Cir. 2017).). See, Tr. 56:2; 59:6; 2521:3-9; 2524:12-20.

H. SUMMARY

There are numerous reasons why the PMA/ILWU Agreement, to which Everport Terminal Services claims to be a party, is unlawful. It cannot operate as a defense in this case.

IV. THE ADMINISTRATIVE LAW JUDGE FAILED TO PROVIDE A REMEDY FOR TWO EMPLOYEES

The Administrative Law Judge inadvertently failed to provide a remedy for Brent Zieska and Michael Tavares. Mr. Zieska was a reefer mechanic who was hired by Everport and remains a discriminatee. He is entitled to the same back pay and other remedies. Similarly, Michael Tavares, a chassis mechanic, was not hired at all by Everport and is a discriminatee. The Decision and Order should be amended.

V. THE REMEDY

A. THE REMEDIES AGAINST EVERPORT TERMINAL SERVICES

The remedy in this case should include the following:

1. Intranet postings;

2. Mailing of the Board Notice to all employees and former employees;

3. Mailing of the Board decision so that the employees will be able to understand the reasons for the Board remedy;

4. Appropriate language in the notice in which the employer acknowledges its unfair labor practice such as:

> We have been found to have unlawfully recognized the ILWU for the mechanics whom we employed. We have been found to have unlawfully applied the PCL&CA to you when you were hired. We have been found to have unlawfully refused to hire qualified mechanics because of their affiliation with the IAM.

5. Notice posting for the period of time from when the violation began until the notice is actually posted;

6. The Posting should be at all facilities including on the West Coast;

7. The employer should email, on a regular basis, the notice of the Board Decision to each employee since it uses email system for distribution of employment related matters;

8. To the extent the employer conducts employee meetings, it should be required to read and discuss the notice at such meetings on at least three occasions;

9. The employees should be afforded work time to read the Board's Decision and the Notice;

10. The employer should allow five hours of time for employees to communicate about Section 7 matters;

11. Post the Notice on its Website with a link to the Decision on the Board's website;

12. Notify the Federal Maritime Commissioner, which regulates the carriers;

13. Notify all state regulatory bodies of its unlawful action;

14. The unlawful provisions and any reference to them should be expunged not just rescinded. *UPMC,* 362 NLRB No. 191 (2015);

15. Everport must withdraw recognition from the ILWU and not be allowed to recognize the ILWU without a Board conducted election. *Duane Reade, Inc*., 338 NLRB 943, 944-45 (2003), *enforced*, 99 F.App'x 240 (D.C. Cir. 2004); *Dairyland USA Corp*., 347 NLRB 310, 314, *enforced sub nom. NLRB v. Local 348-S, United Food & Commercial Workers Int'l Union*, 273 F.App'x 40 (2nd Cir. 2008);

16. The employees should be made whole including any consequential damages such as interest paid on loans, extra travel expense for other employment, costs of tools for other employment, etc. ;

17 The employer should reimburse the Machinists Union the dues that were not deducted that would have occurred had ETS recognized the Machinists Union. Such reimbursement should occur without deduction from the back pay ordered to be paid the employees. *A.W. Farrell & Son, Inc*., 361 NLRB No. 162 (2014);

18. Posting of the Board's Employee Notice for five years. See, https://www.nlrb.gov/poster.

19 Access should be afforded to representatives of the Machinist Union on regular basis for 5 years to remedy the lack of access during the pendency of this unfair labor practice matter.

20. Representatives of the Machinist Union should be allowed to hold meetings with employees for 5 years on company time on company premises because of the lack of access.

These are not extraordinary remedies. They should be the normal remedies in this case.

B. THE REMEDIES AS TO THE ILWU

There are a number of remedies required in this case against the ILWU.

First, the ILWU should be required to disclaim interest in representing the employees of Everport and be prohibited from seeking or obtaining recognition in that unit, absent a Board-conducted election. This is the traditional remedy for the unlawful acceptance of recognition. *Wyco Metal Prods*., 183 NLRB 901, 920 (1970). *See PCMC*, 362 NLRB No. 120. *See also Duane Reade, Inc.*, 338 NLRB at 944-45; *Dairyland USA Corp*., 347 NLRB at 310, 314.

Here, the ILWU required that Everport apply the coast wide PCL&CA agreement to the employees working at Ben E. Nutter Terminal. This was unlawful. This imposed substantial losses on the employees. One of the primary losses was the loss of pension credits and the pension provided for in the agreement, which should have been in place throughout the period to the present that Everport has operated the terminal. Everport should be ordered to make the pension whole and thus make the employees whole for their lost pension, and Everport would be subject to the same remedy. Here, but for the conduct of the ILWU, the employees would have received credits for the IAM pension. The Pension would have received contributions to fund its pension obligations.

The Board has held that where a union causes a loss to employees when it commits violations of the Act, the union must make those employees whole for those losses. *See, e.g.*, *Graphic Arts Int'l Union, Local 280*, 235 NLRB 1084 (1978), *enforced*, 596 F.2d 904 (9th Cir. 1979) (union required to make employees whole where union unlawfully fails to sign agreement); *Bhd. of Teamsters, Local No. 70*, 295 NLRB 1123 (1989) (union ordered to comply with agreement and to make both the employer and the employees whole for any losses as a result of the unlawful repudiation). Here, the ILWU deliberately forced PAOH to abide by the PCL&CA. As described above, the pension was a substantial loss. This make whole remedy is consistent with the normal remedy against an employer who refuses to implement an agreed upon agreement.

Here, the ILWU insisted that Everport recognize it and apply the PCL&CA. Its conduct was the direct cause of Everport's significant losses. It was the direct cause of the loss to the employees. It breached the ILWU's duty of fair representation by depriving the employees of their lawful benefits.

The ILWU breached its duty of fair representation by forcing the maintenance and repair employees to be work under the terms of the PCL&CA. This loss includes the fact that all those who had been members of the ILWU before Everport opened need to be reimbursed and made whole for the loss of benefits and wages they would have earned had Everport recognized the IAM instead of the ILWU. That is because there are differences in vacations, benefits and other parts of the contract that would have benefited these workers and they need to be made whole for the loss of having to work under the ILWU agreement. It should be required to make employees whole under that theory. The ILWU should be required to be jointly and severally liable with Everport for any losses suffered by the employees.

There were additional losses other than the pension. Although the health and welfare program paid for by Everport through the ILWU may have provided alternative benefits, the IAM health and welfare trust lost contributions and was undermined. It may still have liability for benefits for the period after ETS took over the facility. This is a loss to the employees because it weakens the IAM health and welfare plan. The ILWU should make the health and welfare plan, as well as the pension plan, whole for all losses. Those losses would be the contributions that should have been made to the benefits funds under the IAM contracts with the predecessor for the period December 5, 2015, until compliance is achieved.

There were other losses, such as overtime and vacation. The employees should be made whole for those losses, just as they should be made whole for lost pension.

Additionally, there were employees who would have worked for Everport who were members of the IAM. The collective bargaining agreement provided for dues check-off, and many had signed dues check-off for the IAM. To the extent they signed dues check-off, the ILWU should reimburse the IAM for any dues that were not checked off during the period

December 5, 2015, to present. The dues check-off provision survives. *See Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015). *See Hacienda Hotel Inc. Gaming Corp.*, 363 NLRB No. 7 (2015) (normal remedy is dues reimbursement to the union where dues check-off money is not deducted from employees), and *A.W. Farrell & Son, Inc.*, 361 NLRB No. 162 (2014).

The ILWU should also be ordered to make Everport whole for any loss that it suffered as the result of being forced to hire ILWU represented employees and apply the PCL&CA.

The Board has traditionally ordered unions to make employers whole where the employer has been forced to comply with an unlawful agreement. *See S. Cal. Pipe Trades Dist. Council No. 16*, 292 NLRB 270 (1989); *Graphic Arts Int'l Union, Local 280*, 235 NLRB 1084 (1978); *Teamsters Local 70*, 295 NLRB 1123; and *Warehousemen's Union Local 17*, 182 NLRB 781, 787 (1970).

The Board affirmed with the following explanation:

> The General Counsel and the Company, citing, *inter alia*, *Longshoremen ILWU Local 17* (*Los Angeles By-Products Co.*), 182 NLRB 781 (1970), *enfd*. 451 F.2d 1240 (9th Cir. 1971), contend that a make-whole remedy is appropriate under the circumstances of this case as the Company incurred expenses it would not have incurred had Respondents executed and implemented the agreement reached on 6 September. I find merit in this contention. The parties agree the Company could not have effectively implemented the agreement unilaterally. Thus, the Company was compelled to incur losses in operation on the Yellow Creek route that it would not have incurred had Respondents upheld their end of a bargain reached. The Board has previously held make-whole remedies appropriate against unions in similar albeit not identical situations. See *Plumbers Local 420*, 254 NLRB 445 (1981); *Graphic Arts International Local 280*, 235 NLRB 1084 (1978), *enfd*. 596 F.2d 904 (9th Cir. 1979); *Longshoremen Local 17, supra*. The rationale for compensatory damages in these cases is that it precludes the offending party from retaining the fruits of its unlawful action. Respondents argued here that it would be inequitable for them to be required to make the Company whole at the rates reached in the 6 September agreement since the Company subsequently offered concessions in the rates. I find no merit in this argument for it would allow Respondents to negate the terms of the agreement reached with the Company and would allow Respondents to retain at least a portion of the fruits of

> their unlawful actions. I find compensatory damages appropriate here and the recommended Order will provide for such a remedy.

United Steelworkers, 280 NLRB 1401, 1406 (1986).

Thus, it is clear here that Everport incurred duplicate and unnecessary expenses, including payments of large trust fund contributions on account of the unlawful agreement.

The ILWU should be required to post a notice on its external website, as well as any internal intranet that it maintains for the membership. The Notice should be mailed to the entire membership and printed in the ILWU's newspaper, The Dispatcher. The Decision should be mailed to all members. The external website should be available to the public. Any such notice should be posted for the length of time between when the unfair labor practice occurred and when the ILWU eventually posts the notice. Any shorter time, such as sixty days, encourages further delay by Respondents. The ILWU should be order to post the Board's notice of employee rights for five years. See https://www.nlrb.gov/poster.

The notice should affirmatively recognize the violations:

> We have been found to have unlawfully accepted recognition as the bargaining representative of employees working for Ever port Terminal Services at the Ben E. Nutter Terminal in Oakland. The NLRB has found that the Machinists Union was the proper representative of those M and R employees working at that location. We have been further found to have unlawfully required employees to pay dues to the ILWU and we have been required to reimburse them the unlawfully collected dues. [etc.]

The ILWU should be required to mail the notice to all employees who worked at Everport during the period December 5, 2015, to present. This should include all casuals. That mailing should include not only the notice, but also the Decision. The notice itself is not self-explanatory, and only by reading the Decision can employees fully understand the import of the notice. The ILWU has its membership records and can obtain updates through the PMA.

The ILWU should be required to utilize any social media that it uses, such as Twitter, to advise its members of the notice posting and availability of the Decision on the NLRB website. The Notice should be read at all ILWU membership meetings on the coast on at least two occasions. A representative of the NLRB and Charging Party should be allowed to be present.

This is the third time that the ILWU has unlawfully accepted recognition of employees in violation of Section 8(b)(1)(A) and (2). *Retail Clerks Local 588*, 227 NLRB 670 (1976), *enforced*, 587 F.2d 984 (9th Cir. 1978). The ILWU is a repeat violator of the Act insofar as that conduct is concerned. *See PCMC*, 362 NLRB No. 120 (2015). *See, e.g., Int'l Longshore & Warehouse Union,* 363 NLRB No. 12 (concerning related conduct over jurisdiction). What is most egregious is that, in the face of the Board Order in *PCMC*, the ILWU maintained its right to represent the employees at PAOH and lost. A broad remedy is necessary and appropriate here. *Cf. Local 259, UAW*, 198 NLRB 351, 352 (1972).

To be clear, the remedy must apply to the acceptance of recognition under the PCL&CA on a coast wide multi-employer basis. The ILWU has asserted that any group of new employees automatically accretes. That position was rejected by the Board in *PCMC*.[1] That position was rejected by the Board in PAOH. It is not legally tenable. To avoid future disputes, the remedy must make it clear that the ILWU may not accept recognition of any new units under the PCL&CA absent an NLRB-conducted election, which may include an *Armour-Globe* election. This would be appropriate even absent a "proclivity" to violate the Act since the ILWU's position, as stated in *PCMC, PAOH* and in this case, is contrary to the law, and the ILWU has manifested intent to continue this unlawful conduct. The appropriate language is found in *Port Chester Nursing Home*, 269 NLRB 150 (1984):

> In any manner restraining or coercing employees of Respondent Employer, or any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, including accepting recognition from any employer where Respondent Local 6 does not represent an uncoerced majority of employees in an appropriate unit of said Employer, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

The critical language is "any employer." But here it is clearer since all employers become party to one contract, the PCL&CA.

[1] There is no stay, so the decision is final. 29 U.S.C. § 160(g).

Any remedy in this case with respect to recognition should not be limited to the employees at Ben E. Nutter Terminal. Rather, the ILWU maintains that any group working for an employer that is signatory to the PCL&CA-PMA agreement must automatically recognize the ILWU, irrespective of the circumstances. It thus takes the position that any group of employees working for any employer that is a signatory automatically accretes to the ILWU PCL&CA coast wide agreement. In order to remedy this automatic, unqualified assertion of unlawful recognitional status, the remedy should require that no group of employees be accreted to the unit without either a Board election conducted under *Armour-Globe*, or a finding of the Board of a unit clarification petition to accrete the employees. Absent such protection, the ILWU will continue to force employers to recognize it and to bring employees under the coast wide agreement unlawfully.

The ALJ inadvertently provided limited language in the Order:

> 1. Cease and desist from:
>
> a. Accepting assistance and recognition from Respondent Everport Transport Services, Inc., as the exclusive collective bargaining representative of unit employees at a time when ILWU did not represent an uncoerced majority of the employees in the units and when the Machinists were the exclusive collective-bargaining representative of the employees in the units.
>
> b. Maintaining and enforcing the PMA-ILWU Agreement (PCLCD), or any extension, renewal, or modification thereof, including its union-security and hiring hall provisions, so as to cover the unit employees, unless and until ILWU has been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

See ALJ Decision p. 83.

Paragraph b must be amended:

> Maintaining and enforcing the PMA-ILWU Agreement (PCLCD), or any extension, renewal, or modification thereof, including its union-security and hiring hall provisions, so as to cover any unrepresented or employees represented by any other labor organization, unless and until ILWU has been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

The language as drafted by the ALJ would only affect the Everport Terminal Services employees and not others who in the future would be unlawfully brought under the PCL&CA. The Notice must similarly be modified.

In order to allow the Machinists Union to properly represent and notify the employees whom it should have represented, the ILWU should be required to turn over a list to the Charging Party of all the employees who worked at Ben E. Nutter Terminal for the period December 5, 2015, until it complies. That list should include the names, dates that the employees worked (to the extent the ILWU has it), the last known physical and email addresses and their phone numbers.

VI. THE SUGGESTION THAT COUNSEL SHUOLD BE REFERRED TO THE GENRAL COUNSEL FOR CONSIDERATION OF DISCIPLINE IS UNWARRANTED

The ALJ wrongfully suggested that counsel for the charging party should be referred to the General Counsel for consideration of discipline. ALJ Decision, p. 71. All that she found that counsel did was "bait" one of the lawyers for the employer. That lawyer, Mr. Akrotirianakis was thinned-skinned, unfamiliar with Board proceedings, unfamiliar with Board law and insecure. He is the one who should be referred to the General Counsel. If a fish takes the bait is the fisherperson to blame? Or is the lure to blame? We think not.

The ALJ furthermore failed to properly acknowledge that counsels for the General Counsel behaved admirably throughout the hearing. So largely did counsels for the ILWU. There were a few sharp exchanges between them and counsels for the General Counsel and counsel for the Charging Party. But that happens in extended litigation.

Her reference also unduly prejudices the Board before any due process hearings are provided for pursuant to 29 CFR Section 102.77. These Cross-Exceptions if considered by the Board will prevent the Board from reviewing any decision issued pursuant to Section 102.77 by an ALJ because the Board will have reviewed this record. Further since the proceedings under Section 102.77 are not public unless a hearing is held Counsel for Charging Party will have no way of rebutting or explaining the reference in the Decision. Although some may find the

reference to be complementary some may not and his reputation is affected by this statement with no way to rebut it by proving that there was no misconduct. Although we concede that many will read this language as a back-handed complement.

VII. CONCLUSION

For the reasons suggested above, the Board affirm the Decision of the Administrative Law Judge except as requested in these Cross-Exceptions and the Exceptions of the General Counsel.. This has been a lengthy case. The principles which, however, are clear are not complicated. The ILWU and the PMA concocted a scheme to ensure that there would be no successorship for the IAM for the mechanics working for Everport Terminal Services at the Ben E. Nutter Terminal. The conduct was unlawful. A complete remedy is necessary.

Dated: November 26, 2018

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: DAVID A. ROSENFELD

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On November 26, 2018, I served the following documents in the manner described below:

BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 26, 2018, at Alameda, California.

/s/ Karen Kempler
Karen Kempler